Abu Bakar bin Salleh & Ors v Langkasuka Resort Sdn Bhd (Langkawi Beach Resort & Langkawi Airport Sdn Bhd (Hotel Helang)) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(A)-1263–07 OF 2016
HAMID SULTAN, ZAMANI A RAHIM AND ASMABI MOHAMAD JJCA
30 MARCH 2017

Labour Law — Industrial Court — Award — Whether award of Industrial Court suffered from illegality, irrationality and procedural impropriety and had to be quashed — Whether decision of court perverse to facts and evidence such that no reasonable tribunal would have arrived at decision that it did — Whether High Court wrong to have affirmed Industrial Court's award — Whether High Court failed to carry out its own analysis and evaluation of facts and failed to judicially appreciate evidence and relevant law applicable

The appellants were employees of a hotel ('Langkasuka Hotel') and members of the National Union of Hotel, Bar and Restaurant Workers, Peninsular Malaysia ('the union') which had signed a collective agreement ('CA') with the hotel. In early April 2010, Langkasuka Hotel informed the appellants that since the hotel had to temporarily close for renovation and repairs, the appellants and their colleagues would be temporarily relocated to work at another hotel ('Helang Hotel') owned by the first respondent. The union subsequently wrote to Langkasuka Hotel pointing out that under the CA it should have been consulted/informed about the relocation of the appellants. The union alleged mala fides in the move to relocate the employees because the increased work-force at Helang Hotel would result in the employees earning less service charge points than before. The union said the relocation was also an attempt to avoid paying retrenchment benefits to the employees under article 28 of the CA. Due to Langkasuka Hotel's failure to pay the employees service charge due to them as promised, as well as other issues, the union filed a complaint with the Director of Industrial Relations ('DIR') to resolve work issues arising from the relocation. On 26 August 2010, at a conciliatory meeting called by the DIR, the union and Langkasuka Hotel signed a memorandum of agreement ('MOA') which provided that: (a) all the affected workers would be relocated back to Langkasuka Hotel when it reopened for business on 31 October 2010; (b) the workers would be paid their service charge dues from the time they worked at Helang Hotel until the time they returned to work at Langkasuka Hotel; and (c) all outstanding service charge payments due to the workers from April to June of 2010 would be paid within

A two weeks of the signing of the MOA (Langkasuka Hotel failed to make this payment as promised). On 18 September 2010, Langkasuka Hotel, without informing the union, called the appellants to attend an emergency meeting where they were told that: (i) Langkasuka Hotel had been sold to a third party ('Global Upline') and therefore the promise to relocate the appellants back to
B the hotel (which had apparently been renamed as 'Sheraton Langkawi') could not be carried out; and (ii) the appellants could accept an offer to continue working permanently at Helang Hotel. Unhappy with Langkasuka Hotel's sudden turn-around on the agreed terms of the MOA, the appellants left the meeting saying they were only willing to discuss the matter further if
C representatives from the union were present. Langkasuka Hotel interpreted the appellants' 'walk-out' as a rejection of the offer of alternative employment at Helang Hotel and two days later issued letters of dismissal to the appellants. The appellants, who had never received any written offer of employment from
D either Sheraton Langkawi or Helang Hotel, filed a claim for reinstatement under the Industrial Relations Act 1967 on the ground they had been dismissed without just cause or excuse. On hearing their dispute, the Industrial Court ('the second respondent') decided after a trial that the appellants had been properly dismissed. Inter alia, the second respondent ruled that because
E Langkasuka Hotel had undergone a change in ownership, reg 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the 1980 Regulations') applied and that because the appellants had by their 'walk-out' at the emergency meeting on 18 September 2010 rejected the offer of alternative employment, the termination of their employment was justified. The
F appellants' application to the High Court to quash the second respondent's award was unsuccessful. Inter alia, the High Court held that the MOA had become frustrated due to the change in ownership of Langkasuka Hotel and that the appellants' rejection of the offer of alternative employment at Helang Hotel justified their dismissal. The issue in the instant appeal was whether the
G second respondent's decision was tainted with illegality, irrationality and procedural impropriety. The appellants argued, inter alia, that the second respondent had failed to consider that: (1) there was no proof that Langkasuka Hotel had in fact been sold to a third party; hence the reliance on reg 8 of the 1980 Regulations was misplaced; (2) no offer was made by Sheraton Langkawi
H to employ the appellants; (3) Langkasuka Hotel had gone back on its promise in the MOA to take back the appellants when it reopened for business; and (4) the relocation to Helang Hotel had caused the appellants to lose a substantial amount of monthly service charge payments.

I **Held,** allowing the appeal, setting aside the decision of the High Court, quashing the second respondent's award and directing it to assess the compensation in lieu of reinstatement payable to the appellants:

(1) Both the second respondent and the High Court erred in fact and in law in failing to consider that Langkasuka Hotel's claim that it had

undergone a change in ownership was merely a bare assertion unsupported by evidence. This showed that in fact there was no change in the ownership. If it was true that there was a change in ownership, there would have been some form of evidence, either by way of a sale and purchase agreement and/or Form 14A or any other form of documentary evidence to indicate that a transfer had taken place. From the ROC search, there was nothing to connect Global Upline to the ownership of the hotel. Both the second respondent and the High Court failed to properly evaluate the evidence that Langkasuka Hotel's own witnesses had confirmed that at the material time, the owner of Helang Hotel and Sheraton Langkawi was one and the same person (see paras 49 & 50–51).

(2) Common sense would tell that it was impossible to negotiate and finalise the sale of a hotel the size of Langkasuka Hotel within 23 days of the signing of the MOA. Even if the sale had been finalised within that time frame, what it showed was mala fide on the part of Langkasuka Hotel because after agreeing to reinstate the appellants back at the hotel by 31 October 2010, it actually worked behind their back to negotiate the sale of the hotel to defeat cl 2(i) of the MOA. Even if there was a change of ownership as claimed, the new Hotel Sheraton was still bound by the terms and conditions in the CA pursuant to s 17 of the IRA and article 1 of the CA (see paras 48(a)–(b) & 55).

(3) The appellants' contract of employment with Langkasuka Hotel was not terminated in writing to enable fresh offers in writing to be made to them by Helang Hotel. A reasonable employer would have discussed the matter with the union and/or would have issued fresh letters to the appellants to convey to them the terms and conditions of service. There was procedural non-compliance with the mechanism agreed to between the parties under the CA. As such, the second respondent's failure to take this fact into consideration resulted in its decision being tainted with procedural impropriety and/or unfairness (see para 59).

(4) The High Court plainly erred when it decided that reg 8 applied to the facts of the instant case. Regulation 8 was wrongly applied by both the High Court and the second respondent. The purported offers to the appellants were not made by Sheraton Langkawi as envisaged by reg 8 but by a different entity, Helang Hotel. Even if there was a change of ownership, there was no offer from the new owner to absolve liability under reg 8. Therefore, Langkasuka Hotel could not rely on reg 8 to terminate the appellants and/or to deny them of their rights to termination benefits. There was no real or proper offer of employment made on 18 September 2010 when the emergency meeting was called, for the appellants to reject anything as claimed. The whole process viewed from the perspective of a reasonable employer was to deny the appellants of their entitlement to negotiate pursuant to the CA and/or to refer such

dispute in accordance with the scheme provided by the IRA. Langkasuka Hotel showed a clear intention not to be bound by the CA, especially cl 4 for the settlement of disputes, which recognised the importance of full discussions in clearing misunderstandings and to take reasonable efforts to preserve industrial harmony (see paras 60–64).

(5) There was no evidence to support the contention that the termination of the appellants' employment with Langkasuka Hotel was for good reason. The appellants were terminated on 21 September 2010, one day after the termination notice dated 20 September 2010 was issued in an emergency meeting without giving them any notice and/or any monetary compensation in lieu of notice based on the ground they had staged a walk-out. At that point in time, there was no proper and clear offer made to them. Helang Hotel had not employed them properly and Langkasuka Hotel had not made any offers in writing and given the appellants time to ponder, discuss or counter-offer. The whole exercise was an arbitrary act on the part of Langkasuka Hotel to the detriment of the appellants. The hotel also failed to give notice to the union and/or failed to provide the environment for discussion and/or conciliation (see para 65).

(6) Langkasuka Hotel's decision not only breached cl 2(ii) of the MOA but deprived the appellants of their wages and hence was a violation of the Employment Act 1955 which required wages of any one month to be paid by the seven day of the following month, at the latest. This had caused injustice to the appellants. There was evidence that the average monthly service charge per point in Langkasuka Hotel for 2009 was RM257.92 whereas it was a mere RM28.79 in Helang Hotel. Besides that, there were instances where service charge had not been paid at all. As at 18 September 2010, the service charge for May and June 2010 had not been paid and the April 2010 service charge was paid only in September that year (see paras 69–70).

(7) No notice of termination was issued by Langkasuka Hotel as required by law. The termination was in fact effected by Helang Hotel which had not shown that it had made a written offer to the appellants which was rejected. There was no job offer from Sheraton Langkawi and no notice of change of ownership was ever given to the appellants by Langkasuka Hotel. The second respondent had committed an error of law in not taking these facts and grounds into consideration (see para 72).

(8) The findings of the second respondent were arrived at by taking into consideration irrelevant matters and/or failing to take into consideration relevant considerations. The second respondent's decision was unreasonable and predicated on unsupported evidence and/or law and the decision-making process was tainted with the elements of illegality, irrationality and procedural impropriety. No reasonable tribunal would have come to the conclusion reached by the second respondent. In

affirming the second respondent's award, the High Court judge did so without making her own analysis and evaluation of the facts surrounding the appeal and/or without appreciating the relevant law applicable to the factual matrix of the case. She failed to judicially appreciate the evidence and/or the law presented before her which rendered her decision plainly wrong (see paras 73–76).

[Bahasa Malaysia summary

Perayu-perayu ialah pekerja sebuah hotel ('Hotel Langkasuka') dan ahli-ahli Kesatuan Kebangsaan Hotel, Pekerja Bar dan Restoran, Semenanjung Malaysia ('kesatuan tersebut') yang telah menandatangani perjanjian kolektif ('PK') dengan hotel tersebut. Pada awal April 2010, Hotel Langkasuka memberitahu perayu-perayu, oleh kerana hotel tersebut perlu tutup sementara untuk pengubahsuaian dan pembaikan, perayu-perayu dan rakan sekerja mereka akan dipindahkan untuk bekerja sementara di hotel lain ('Hotel Helang') yang dimiliki oleh responden pertama. Kesatuan tersebut kemudian telah menulis kepada Hotel Langkasuka menegaskan bahawa di bawah PK tersebut ia patut dirujuk/dimaklumkan tentang pemindahan perayu-perayu. Kesatuan tersebut dikatakan berniat jahat dalam usaha untuk memindahkan pekerja-pekerja tersebut disebabkan peningkatan tenaga kerja di Hotel Helang akan mengakibatkan pekerja-pekerja tersebut memperoleh pendapatan kurang poin caj perkhidmatan dari sebelumnya. Kesatuan tersebut mengatakan pemindahan tersebut juga satu percubaan untuk mengelakkan daripada membayar faedah pemberhentian pekerja kepada pekerja-pekerja tersebut di bawah perkara 28 PK tersebut. Akibat kegagalan Hotel Langkasuka untuk membayar pekerja-pekerja tersebut caj perkhidmatan yang kena dibayar kepada mereka sepertimana dijanjikan, dan juga isu-isu lain, kesatuan tersebut telah memfailkan aduan dengan Pengarah Perhubungan Perindustrian ('PPP') untuk menyelesaikan isu-isu kerja yang timbul daripada pemindahan tersebut. Pada 26 Ogos 2010, di mesyuarat pendamai oleh PPP, kesatuan tersebut dan Hotel Langkasuka telah menandatangani memorandum perjanjian ('MP') yang memperuntukkan bahawa: (a) semua pekerja-pekerja yang terjejas akan dipindahkan semula ke Hotel Langkasuka apabila ia dibuka semula untuk perniagaan pada 31 Oktober 2010; (b) pekerja-pekerja tersebut akan dibayar caj perkhidmatan mereka yang kena dibayar dari masa mereka bekerja di Hotel Helang sehingga masa mereka kembali bekerja di Hotel Langkasuka; dan (c) semua pembayaran caj perkhidmatan tertunggak yang perlu dibayar kepada pekerja-pekerja dari April hingga Jun 2010 akan dibayar dalam tempoh dua minggu dari penandatanganan MP (Hotel Langkasuka telah gagal membuat bayaran ini sepertimana dijanjikan). Pada 18 September 2010, Hotel Langkasuka, tanpa memberitahu kesatuan tersebut, telah memanggil perayu-perayu untuk menghadiri mesyuarat tergempar di mana mereka diberitahu bahawa: (i) Hotel Langkasuka telah dijual kepada pihak ketiga ('Global Upline') dan oleh itu janji untuk memindahkan semula perayu-perayu balik ke hotel tersebut (yang nampaknya telah dinamakan

A semula sebagai 'Sheraton Langkawi') tidak dapat dijalankan; dan (ii) perayu-perayu boleh menerima tawaran untuk sambung bekerja tetap di Hotel Helang. Tidak gembira dengan tindakan bertukar tiba-tiba Hotel Langkasuka berhubung terma-terma MP yang dipersetujui, perayu-perayu telah meninggalkan mesyuarat tersebut mengatakan mereka hanya bersedia untuk B berbincang perkara tersebut selanjutnya jika wakil daripada kesatuan tersebut hadir. Hotel Langkasuka mentafsirkan 'walk-out' perayu-perayu sebagai menolak tawaran pekerjaan alternatif di Hotel Helang dan dua hari kemudian telah mengeluarkan surat-surat pemecatan kepada perayu-perayu. Perayu-perayu, yang tidak menerima apa-apa tawaran bertulis berhubung C pekerjaan sama ada daripada Sheraton Langkawi atau Hotel Helang, telah memfailkan tuntutan untuk pengembalian semula jawatan di bawah Akta Perhubungan Perindustrian 1967 atas alasan mereka telah dipecat tanpa sebab atau alasan yang adil. Apabila mendengar pertikaian mereka, Mahkamah D Perindustrian ('responden kedua') telah memutuskan selepas perbicaraan bahawa perayu-perayu telah dipecat sewajarnya. Antara lain, responden kedua memutuskan bahawa kerana Hotel Langkasuka telah menjalani perubahan dalam pemilikan peraturan 8 Peraturan-Peraturan Kerja (Faedah-Faedah Penamatan dan Rentikerja Sentara) 1980 ('Peraturan 1980') terpakai dan E bahawa kerana perayu-perayu telah melalui 'walk-out' mereka di mesyuarat tergempar tersebut pada 18 September 2010 telah menolak tawaran pekerjaan alternatif itu, penamatan pekerjaan mereka adalah wajar. Permohonan perayu-perayu kepada Mahkamah Tinggi untuk membatalkan award responden kedua tidak berjaya. Antara lain, Mahkamah Tinggi memutuskan F bahawa MP tersebut telah dikecewakan akibat perubahan dalam pemilikan Hotel Langkasuka dan bahawa penolakan tawaran perayu-perayu berhubung pekerjaan alternatif di Hotel Helang mewajarkan pemecatan mereka. Isu dalam rayuan ini adalah sama ada keputusan responden kedua dicemari dengan ketidaksahan, tidak rasional dan ketidakpatuhan prosedur. G Perayu-perayu berhujah, antara lain, bahawa responden kedua telah gagal untuk mempertimbangkan bahawa: (1) tiada bukti yang Hotel Langkasuka sememangnya telah dijual kepada pihak ketiga; justeru kebergantungan kepada peraturan 8 Peraturan 1980 tersebut adalah tidak kena; (2) tiada tawaran dibuat oleh Sheraton Langkawi untuk mengambil bekerja H pekerja-pekerja tersebut; (3) Hotel Langkasuka telah mungkir janji dalam MP tersebut untuk mengambil semula perayu-perayu apabila ia dibuka semula untuk perniagaan; dan (4) pemindahan semula ke Hotel Helang telah menyebabkan perayu-perayu hilang jumlah besar bayaran caj perkhidmatan bulanan.

I

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, membatalkan award responden kedua dan mengarahkannya untuk mentaksir pampasan menggantikan pengembalian semula jawatan yang perlu dibayar kepada perayu-perayu:

(1) Kedua-dua responden kedua dan Mahkamah Tinggi terkhilaf dari segi fakta dan undang-undang kerana gagal mempertimbangkan dakwaan Hotel Langkasuka bahawa ia telah menjalani perubahan pemilikan yang mana hanya penegasan semata-mata tanpa disokong oleh keterangan. Ini menunjukkan bahawa pada hakikatnya tiada perubahan dalam pemilikan. Jika ia benar bahawa terdapat perubahan dalam pemilikan, ia adalah dalam bentuk keterangan, sama ada melalui perjanjian jual beli dan/atau Borang 14A atau apa-apa bentuk keterangan dokumentar lain untuk menunjukkan pemindahan telah berlaku. Berdasarkan carian ROC, tiada apa-apa untuk mengaitkan Global Upline dengan pemilikan hotel tersebut. Kedua-dua responden kedua dan Mahkamah Tinggi telah gagal untuk menilai sewajarnya keterangan bahawa saksi-saksi Hotel Langkasuka sendiri telah mengesahkan bahawa pada masa matan, pemilik Hotel Helang dan Sheraton Langkawi adalah satu dan orang yang sama (lihat perenggan 49 & 50–51).

(2) Akal akan memberitahu bahawa ia mustahil untuk berunding dan memuktamadkan jualan hotel bersaiz Hotel Langkasuka dalam 23 hari menandatangani MP tersebut. Jikapun jualan telah dimuktamadkan dalam tempoh masa itu, apa yang ditunjukkannya adalah niat jahat di pihak Hotel Langkasuka kerana selepas bersetuju untuk mengembalikan semula jawatan perayu-perayu kembali ke hotel tersebut menjelang 31 Oktober 2010, ia sebenarnya telah berunding tanpa pengetahuan mereka untuk jualan hotel tersebut agar fasal 2(i) MP tersebut gagal. Jikapun terdapat perubahan dalam pemilikan sepertimana didakwa, Hotel Sheraton yang baru masih terikat oleh terma dan syarat dalam PK tersebut menurut s 17 APP dan perkara 1 PK tersebut (lihat perenggan 48(a) & (b) & 55).

(3) Kontrak pekerjaan perayu-perayu dengan Hotel Langkasuka tidak ditamatkan secara bertulis untuk membolehkan tawaran baru secara bertulis dibuat kepada mereka oleh Hotel Helang. Majikan yang munasabah akan berbincang perkara tersebut dengan kesatuan tersebut dan/atau akan mengeluarkan surat-surat baru kepada perayu-perayu untuk memberitahu kepada mereka terma dan syarat perkhidmatan. Terdapat ketidakpatuhan prosedur dengan mekanisme yang dipersetujui antara pihak-pihak di di bawah PK tersebut. Oleh itu, kegagalan responden kedua untuk mengambil fakta ini untuk dipertimbangkan mengakibatkan keputusannya dicemari dengan ketidakpatuhan prosedur dan/atau ketidakadilan (lihat perenggan 59).

(4) Mahkamah Tinggi jelas terkhilaf apabila ia memutuskan bahawa peraturan 8 terpakai kepada fakta dalam kes ini. Peraturan 8 terpakai dengan salah oleh kedua-dua Mahkamah Tinggi dan responden kedua. Tawaran-tawaran yang dimaksudkan kepada perayu-perayu tidak dibuat oleh Sheraton Langkasi sepertimana termaktub dalam peraturan 8 tetapi

A oleh entiti berbeza, Hotel Helang. Jikapun terdapat perubahan pemilikan, tiada tawaran daripada pemilik baru untuk membebaskan daripada liabiliti di bawah peraturan 8. Oleh itu, Hotel Langkasuka tidak boleh bergantung kepada peraturan 8 untuk menamatkan perayu-perayu dan/atau untuk menafikan mereka hak mereka untuk faedah penamatan.
B Tiada tawaran sebenar atau wajar yang telah dibuat pada 18 September 2010 apabila mesyuarat tergempar dipanggil, untuk perayu-perayu menolak apa-apa sepertimana didakwa. Keseluruhan proses daripada perspektif majikan yang munasabah adalah untuk menafikan
C perayu-perayu hak mereka untuk berunding menurut PK tersebut dan/atau untuk merujuk pertikaian sedemikian menurut skim yang diperuntukkan oleh APP. Hotel Langkasuka menunjukkan niat jelas untuk tidak terikat oleh PK tersebut, terutamanya klausa 4 untuk penyelesaian petikaian, yang mengiktiraf kepentingan perbincangan
D penuh dalam memperjelaskan salah faham dan untuk membuat usaha-usaha yang munasabah bagi mengekalkan keharmonian perindustrian (lihat perenggan 60–64).

(5) Tiada keterangan untuk menyokong hujah bahawa penamatan pekerjaan
E perayu-perayu dengan Hotel Langkasuka adalah untuk sebab yang baik. Perayu-perayu telah ditamatkan pada 21 September 2010, sehari selepas notis penamatan bertarikh 20 September 2010 dikeluarkan dalam mesyuarat tergempar tanpa memberi mereka apa-apa notis dan/atau apa-apa pampasan kewangan bagi menggantikan notis berdasarkan
F alasan mereka telah melakukan jalan keluar. Pada masa itu, tiada tawaran wajar dan jelas dibuat kepada mereka. Hotel Helang tidak mengambil mereka bekerja secara wajar dan Hotel Langkasuka tidak membuat apa-apa tawaran secara bertuli dan memberikan perayu-perayu masa untuk berfikir, berbincang atau balas tawaran. Keseluruhan malan
G tersebut adalah perbuatan sewenang-wenangnya di pihak Hotel Langkasuka untuk menjejaskan perayu-perayu. Hotel tersebut juga gagal memberikan notis kepada kesatuan tersebut dan/atau gagal menyediakan persekitaran untuk perbincangan dan/atau perdamaian (lihat perenggan 65).

H (6) Keputusan Hotel Langkasuka bukan sahaja melanggar klausa 2(ii) MP tersebut tetapi menafikan gaji perayu-perayu dan justeru satu pelanggaran Akta Pekerjaan 1955 yang menghendaki gaji mana-mana satu bulan dibayar menjelang hari ketujuh bulan berikutnya, paling lewat. Ini telah menyebabkan ketidakadilan kepada perayu-perayu.
I Terdapat keterangan bahawa purata bulanan caj perkhidmatan bagi satu poin di Hotel Langkasuka pada 2009 adalah RM257.92 manakala ia hanya RM28.79 di Hotel Helang. Selain itu, terdapat kejadian di mana caj perkhidmatan tidak dibayar langsung. Sehingga 18 September 2010, caj perkhidmatan untuk Mei dan Jun 2010 tidak dibayar dan caj

perkhidmatan April 2010 hanya dibayar pada September tahun tersebut (lihat perenggan 69–70).

(7) Tiada notis penamatan telah dikeluarkan oleh Hotel Langkasuka sepertimana dikehendaki oleh undang-undang. Penamatan itu pada hakikatnya telah dilakukan oleh Hotel Helang yang tidak menunjukkan bahawa ia telah membuat tawaran secara bertulis kepada perayu-perayu yang telah ditolak. Tiada tawaran pekerjaan daripada Sheraton Langkawi dan tiada notis perubahan dalam pemilikan telahpun diberikan kepada perayu-perayu oleh Hotel Langkasuka. Responden kedua telah melakukan kesilapan undang-undang kerana tidak mempertimbangkan fakta dan alasan tersebut (lihat perenggan 72).

(8) Dapatan responden kedua dibuat dengan mengambil kita perkara-perkara tidak relevan dan/atau gagal untuk mengambil kira pertimbangan yang relevan. Keputusan responden kedua adalah tidak munasabah dan berdasarkan keterangan yang tidak disokong dan/atau undang-undang dan proses membuat keputusan yang dicemari elemen-elemen kebersalahan, tidak rasional dan ketidakadilan prosedur. Dalam mengesahkan award responden, hakim Mahkamah Tinggi telah melakukan sedemikian tanpa membuat analisis dan penilaian beliau sendiri tentang fakta mengenai rayuan dan/atau tanpa memahami undang-undang relevan yang terpakai kepada matriks faktual kes. Beliau gagal untuk memahami secara kehakiman keterangan dan/atau undang-undang yang dikemukakan di hadapannya yang menyebabkan keputusannya jelas salah (lihat perenggan 73–76).]

Notes

For cases on award, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1730–1803.

Cases referred to

Abdul Aziz Abdul Majid & Ors v Kuantan Beach Hotel Sdn Bhd & Ors [2012] 1 LNS 1294, CA (refd)

Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223, CA (refd)

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2017] 9 MLJ 119; [2015] 1 LNS 1450, HC (refd)

Datuk Justine Jinggut v Pendaftar Pertubuhan [2012] 3 MLJ 212, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Kesatuan Pekerja-pekerja Hotel, Bar & Restoran, Semenanjung Malaysia v Hotel Equatorial (M) Sdn Bhd [2008] 3 ILR 590 (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (folld)

Kumpulan Kamuning Sdn Bhd v Rajoo And 200 Others [1983] 2 MLJ 400; [1983] CLJ Rep 207, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)
Malaysia Baggage Transport Agency Sdn Bhd v National Union of Commercial Workers [1984] 1 ILR 13, IC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Radtha d/o Raju & Ors v Dunlop Estates Bhd [1996] 1 MLJ 561; [1996] 1 CLJ 755, CA (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765; [2014] 6 CLJ 541, FC (refd)

Legislation referred to

Employment Act 1955 s 12(3)
Employment (Termination and Lay-Off Benefit) Regulations 1980 reg 8, 8(1), (2)
Federal Constitution
Industrial Relations Act 1967 ss 17, 18, 20(2), 20(3), 54(1), (2)
National Land Code Form 14A
Rules of Court 2012 O 53, O 53 r 3

Alex Keong (Eric Cheah with him) (Hong, Cheah & Co) for the appellants.
Darshan Singh (Jaswant Kaur with him) (Darshan & Jaswant) for the respondents.

Asmabi Mohamad JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants (the applicants in the High Court) against of the decision of the High Court dated 26 May 2016 that upheld the Industrial Court's Award No 50 of 2015.

[2] We heard this appeal on 1 December 2016. After hearing the respective parties we adjourned the matter for our consideration and decision. Before we adjourned the same, we ordered the parties to further submit on the issue of whether a company can transfer its employees to an associate company, which submission was to be delivered to our respective secretaries within a week from the date of hearing.

[3] We now give our decision and the reasons for the same.

[4] We will refer to the parties as they were described in the High Court. **A**

BRIEF BACKGROUND FACTS

[5] The facts are elucidated from the various affidavits, the award of the second respondent, judgment of the learned High Court judge and the submissions of the respective parties. In order to save judicial time, some of the facts as highlighted by the respective parties in the above-mentioned documents are adopted herein with and/or without modifications. **B**

[6] The subject matter of this case was a reference under s 20(3) of the Industrial Relations Act 1967 ('the IRA'). The applicants who were employees of Langkasuka Hotel and members of a union known as the National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia ('Union') had lodged a complaint to the Department of Industrial Relations ('DIR') pertaining to their dismissal from the employment of Langkasuka Hotel without just cause and excuse. The Minister referred the representation to the Industrial Court for an award. On 15 January 2015, the Chairman of the Industrial Court, after a trial, found that the applicants were dismissed with just cause and excuse and dismissed the applicants' claims. **C** **D** **E**

[7] The applicants then moved the High Court by way of a judicial review to quash the second respondent's award and that too was dismissed by the High Court. Aggrieved by the said decision the applicants then filed their appeal to this court. **F**

[8] The applicants were the employees of a hotel known as Langkasuka Resort Sdn Bhd/Langkasuka Beach Resort ('Langkasuka Hotel') in Pulau Langkawi, Kedah. The particulars of each applicant were as set out in exh A annexed to the applicants' affidavit in support of the application for judicial review sworn by Abu Bakar bin Salleh (see pp 60–94 of *Jld* 2 of appeal record Parts B and C). These employees were paid salaries and benefits in accordance with the terms and conditions as set out in the collective agreement ('CA') entered into between Langkasuka Hotel and the Union ('union') dated 1 October 2006 (see pp 133–153 of *Jld* 2 of appeal record Parts B and C). **G** **H**

[9] On 2 April 2010, Langkasuka Hotel had notified the applicants that it had temporarily ceased operations with effect from 1 April 2010 for the purpose of renovation and repair works. The applicants were also notified that whilst the renovation and repair works were being carried out, these employees would be temporarily relocated at another hotel known as Helang Hotel, also owned by the first respondent, subject to the same terms and conditions of employment. **I**

[10] Based on the above understanding, the applicants and other employees relocated themselves at Helang Hotel.

[11] On 8 May 2010, the union on behalf of the applicants wrote a letter to Langkasuka Hotel alleging that their relocation to Helang Hotel was done mala fide based on the following reasons:

(a) the decision to relocate the employees to Helang Hotel was done without prior consultation with the union under article 4 of the CA pertaining to settlement of dispute and failure to adhere to the articles in Code of Conduct For Industrial Harmony 1975;

(b) the relocation of its members would result in excess of workers in Helang Hotel thereby causing the value of the service charge points to drop drastically; and

(c) the decision of Langkasuka Hotel to relocate its employees was motivated by ulterior and/or collateral motive in order to avoid payment of retrenchment benefits to the employees, provided under article 28 of the CA.

(See p 132 of *Jld* 2 of appeal record Parts B and C).

[12] Subsequently Langkasuka Hotel had failed to pay the service charges to the employees as promised in its letter dated 2 April 2010 and in accordance with article 12 of the CA (see p 138 of *Jld* 2 of appeal record Parts B and C).

[13] As a result of Langkasuka's Hotel failure to resolve outstanding issues faced by the employees, the union lodged a complaint with the DIR under s 18 of the IRA.

[14] On 26 August 2010, a conciliation meeting was convened with the assistance of the DIR. In this meeting, and in the presence of the DIR, both the union and Langkasuka Hotel had agreed to sign a memorandum of agreement ('MoA') (see pp 154–155 of *Jld* 2 of appeal record Parts B and C) with the following terms:

(a) Langkasuka Hotel was scheduled to be reopened on 31 October 2010 and all employees of the said hotel would be relocated back to work at the said hotel (see cl 2(i) of the MoA);

(b) the employees of Langkasuka Hotel would be paid all service charge entitlements from the time they worked in Helang Hotel until they are relocated back to the original hotel ie Langkasuka Hotel (see cl 2(ii) of the MoA); and

(c) the outstanding service charge entitlements due to employees of Langkasuka Hotel from April 2010–June 2010 would be paid within

two weeks from the date of the MoA and to be paid before Hari Raya Aidil Fitri (see cl 2(iii) of the MoA).

[15] Pursuant to the MoA, it was also agreed that the dispute between the parties was deemed resolved upon the terms and conditions stated therein having been complied with.

[16] Despite having signed the MoA and given the assurance to the Applicants that their outstanding service charges would be paid within two weeks from the date the MoA was executed, ie 26 August 2010, Langkasuka Hotel failed to honour cl 2(iii) of the MoA. The same was not paid within two weeks as promised. Instead the applicants were only paid their basic salaries on 8 September 2010 just before Hari Raya Aidil Fitri.

[17] About 23 days after the signing of the MoA, ie on 18 September 2010, Langkasuka Hotel called for an emergency meeting with the applicants without informing the union. In this meeting the following was announced:

(a) that Langkasuka Hotel was sold to Global Upline Sdn Bhd (a third party). As such Langkasuka Hotel would not be in a position to relocate the applicants back to the said hotel as promised; and

(b) Langkasuka Hotel had made an offer to relocate the applicants permanently in Helang Hotel also owned by the same owner subject to the same terms and conditions of employment.

[18] The employees were not happy with the sudden turn of event and requested Langkasuka Hotel to abide by the terms of the MoA. This was because just about 23 days prior to this meeting, ie on 26 August 2010, Langkasuka Hotel had given the assurance that these employees would be relocated at their original place of employment once it reopened for business, ie on 31 October 2010. This assurance was made in the presence of the Director of Industrial Relations Kedah/Perlis. The applicants informed in the meeting that they were willing to discuss the problem in the presence of the union and left the meeting.

[19] Langkasuka Hotel on the other hand alleged that it could not reinstate the applicants in Langkasuka Hotel as it was 'legally rendered impossible' and was beyond the 'control and purview' of Langkasuka Hotel because the property had been transferred to a new owner, Global Upline Sdn Bhd ('Global Upline') and the said hotel had been given a new name, 'Four Points By Sheraton Langkawi Resort' ('Sheraton Langkawi').

A **[20]** On 21 September 2010, Langkasuka Hotel called all the employees for a meeting and at this meeting all the applicants were given a letter of dismissal dated 20 September 2010, signed by Tan Sri Datuk Ting Pek Khiing, the original owner of Langkasuka Hotel (see p 89 of *Jld* 2 of appeal record Parts B and C). Langkasuka Hotel viewed the refusal of the applicants to accept the
B offer made during the emergency meeting and the alleged walk-out staged by them from the meeting as a rejection of the offer for their permanent relocation in Helang Hotel. The dismissal letter was issued by Tan Sri Ting Pek Khiing on behalf of Helang Hotel. Up to this point in time, there was no written offer made either by Sheraton Langkawi, the new hotel or Helang Hotel to the
C applicants.

[21] As at 21 September 2010, Langkasuka Hotel had not officially terminated the applicants' employment to enable these applicants to take up a
D fresh offer from Helang Hotel. Neither had Helang Hotel made any official and/or written offer to each of the applicant for these applicants to consider working for Helang Hotel permanently.

[22] Despite the existence of the CA between Langkasuka Hotel and the
E union, the union was not notified and/or consulted pertaining to the events which we highlighted above.

THE APPEAL

F **[23]** Before us, the issue for determination was whether the decision of the second respondent dated 15 January 2015 was tainted with illegality, irrationality and procedural impropriety.

IN THE HIGH COURT

G

[24] The applicants filed their application for judicial review under O 53 of the Rules of Court 2012 ('the RoC') on 17 April 2015.

H **[25]** In their statement filed pursuant to O 53 r 3 of the RoC, the applicants had cited irrationality, unreasonableness and procedural impropriety as the basis to challenge the decision of the second respondent which dismissed their claim that they were dismissed without just cause or excuse.

I THE APPLICANTS' CASE

[26] Before the High Court, the applicants contended that in arriving at Award No 50 of 2015 dated 15 January 2015, the second respondent erred as:

(a) it had failed to take relevant matters into consideration;

(b) it had taken irrelevant matters into consideration;

(c) it had disregarded the law which are applicable to the factual matrix of the case before it; and

(d) the decision of the second respondent was so perverse and devoid of plausible justification that no reasonable tribunal could have arrived at such decision.

[27] The applicants further contended that they had never staged a walk out and/or had rejected Langkasuka Hotel's offer at the meeting held on 18 September 2010 as alleged by the said hotel. They merely requested Langkasuka Hotel to abide by the terms in the MoA which was signed by both the union and Langkasuka Hotel on 26 August 2010 and in the presence of the Director of Industrial Relations Kedah/Perlis.

[28] The applicants submitted that in arriving at the said award, the second respondent had failed to consider the following factors:

(a) there was no offer from the new owner, Sheraton Langkawi to employ the applicants in its new hotel;

(b) Langkasuka Hotel had breached the terms of the MoA dated 26 August 2010;

(c) the applicants had lost about 80% in terms of their monthly service charges; and

(d) there was no proof that Langkasuka Hotel had in fact been sold to a third party and/or that it had changed hands as claimed.

[29] In view of the above, the applicants submitted that Langkasuka Hotel could not rely on reg 8 of the Employment (Termination and Lay-Off Benefit) Regulations 1980 ('the 1980 Regulations') to claim that a change has occurred within the said establishment. Further as there was no offer made by Sheraton Langkawi under reg 8 of the 1980 Regulations, Langkasuka Hotel could not rely on reg 8.

[30] It was also contended by the applicants that Langkasuka Hotel had failed to honour the terms of the MoA, in that, its promise to relocate back all the applicants to their original employment with Langkasuka Hotel once it reopened for business on 31 October 2010.

[31] In addition to the above the applicants submitted that as there was already a CA entered into between Langkasuka Hotel and the union, pursuant to the IRA the CA is binding on both the union and Langkasuka Hotel. Therefore, it was mandatory for Langkasuka Hotel to abide by the terms and

A conditions stated in the CA. Hence any dispute or matters affecting the union members must be resolved in a harmonious manner and with prior consultation with the union especially matters as serious as this, touching their rights to livelihood, as guaranteed by the Federal Constitution.

B THE RESPONDENT'S CASE

[32] The first respondent contended that the reinstatement of the applicants in Langkasuka Hotel was 'legally rendered impossible' and was 'beyond the control and purview' of the Langkasuka Hotel as the property had passed to its C new owner, Global Upline.

[33] It was further submitted by the first respondent that the applicants had staged a walk out on 18 September 2010 at the emergency meeting which was held to announce their permanent relocation at Helang Hotel. By their D conduct to stage a walk out during the said meeting, the applicants had rejected the offer of permanent employment in Helang Hotel. Therefore, their dismissal was with just cause and excuse.

E **[34]** Regulation 8 of the 1980 Regulation was applicable to the factual matrix of this case. A change has occurred in the ownership of the business of Langkasuka Hotel. As the applicants were offered permanent employment at Helang Hotel by Langkasuka Hotel which they rejected via their conduct to walk out of the meeting dated 18 September 2010, it was sufficient justification for the dismissal of the applicants. F

OUR DECISION

The law

G **[35]** We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[36] In the course of that, we had sought guidance from the very often H quoted case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of I the evidence.

[37] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial

appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[38] We were also mindful of our role in dealing with the appeal at hand which originated by way of a judicial review application. The issue on the proper approach to deal with the appeal was ventilated by both the respective parties. We do not propose to deal with the law pertaining to the scope of judicial review at great length as the law is trite. We were guided by a plethora of cases which ruled that judicial review is not an appeal from the decision but a review of the manner in which the decision was made and that the High Court in hearing the judicial review is not entitled to consider whether the decision itself, on the merits of the facts, was reasonable and fair. Suffice for the court to refer to the recent Federal Court case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1, where His Lordship Suriyadi Halim Omar FCJ had stated as follows:

> [69] A judicial review is a court proceeding where a challenge is made on the decision of the relevant authority or entity (in this case the appellant) ie, by challenging the lawfulness of the decision-making process. This is trite law. Generally, the court dealing with the judicial review application in a supervisory capacity is not to delve into the merits of the case. In other words, the evidence is not reassessed. The court is merely to quash the decision of the relevant authority, if need be, and not to substitute with what it thinks is the correct decision. We are not here to usurp the powers of the designated authority.

[39] Notwithstanding the above, we were also aware that the law on judicial review had developed so as to give the power to the court hearing a judicial review matter to scrutinise such decision not only for process, but also for substance to determine the reasonableness of the decision. Therefore, the conventional concept that judicial review is concerned only with the review in the manner a decision is made is no longer the correct approach to be adopted by the court in dealing with judicial review cases (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; [2014] 6 CLJ 541; *Datuk Justine Jinggut v Pendaftar Pertubuhan* [2012] 3 MLJ 212; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

[40] These principles were reiterated in the recent Federal Court case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* above in the following terms:

> [71] However, the Federal Court in the landmark decision of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 held

A that the decision of an inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality', which not only permits the courts to scrutinise the decision-making process but also the decision itself. In short, it allows the courts to delve into the merits of the matter.

B [72] The approach of illegality and irrationality was recognised and applied by *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525. This court in succinct terms said:

> On the facts of this case, we find MTUC had failed to show that the Minister's decision was illegal, irrational and flawed on the grounds of procedural impropriety.

C

[73] It is now clear, and here to stay, that the decision of an inferior tribunal may also be reviewed on the grounds of illegality and irrationality. *The distinction between a review application and an appeal thus appears to no longer exist* (see also *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

D

[41] Guided by the above established principle, we had therefore carefully examined the documents that were placed before us in the form of the record of appeal to ascertain if the learned High Court judge had arrived at her E decision correctly on the basis of the relevant law and evidence before her.

[42] It would be apt at this juncture for us to examine the basis of the second respondent's decision to dismiss the applicants' claim for dismissal without just cause and excuse to enable this court to scrutinise the decision not only for F process but also for substance.

[43] The basis of the second respondent's decision to dismiss the applicants claim for dismissal without just cause and excuse were as follows:

G (a) s 12(3) of the Employment Act 1955 recognises closure of business as a valid ground for termination of employee. The termination is found to be as a result of a bona fide closure of business, therefore the Industrial Court would have no jurisdiction to award any form of compensation (reliance on the case of *Malaysia Baggage Transport Agency Sdn Bhd v National Union of Commercial Workers* [1984] 1 ILR 13);

H

(b) reg 8 of the 1980 Regulations is applicable to the factual matrix of this case. Regulation 8 states that in the event there is a change due to a sale, other disposition or operation of law in the ownership of the business for the purpose of which an employee is employed, and an offer is made by I the person who had taken ownership of the business to the employee within seven days of the change of ownership under the terms and conditions of employment not less favourable than the original employment, and if the employee had unreasonably refused the offer, there is sufficient justification for the dismissal;

(c) as Langkasuka Hotel had been operating as a new legal entity since 31 October 2010 with full compliment of staff, it would not be justified for the court to order reinstatement of the applicants at the said hotel; and

(d) the applicants had walked out from the meeting and this clearly indicated that the applicants declined the employment with the hotel under the same terms and conditions. Therefore, the termination of employment was with just cause and excuse.

[44] We now turn to the reasons advanced by the learned High Court judge in upholding the award of the second respondent:

(a) the applicants' demand to be relocated at Langkasuka Hotel was impossible to be fulfilled because the new hotel is a new entity. The applicants could not force Sheraton Langkawi to reinstate them as their employees because the MoA is no longer in existence. The MoA had become a frustrated contract. Langkasuka Hotel no longer existed. Although the new hotel did not offer employment to the applicants, Helang Hotel did;

(b) although the service charges were very much reduced, this was due to the fact that the service charges were to be shared with a large number of employees. This is not a situation where Langkasuka Hotel had purposely reduced the service charges without any valid reasons;

(c) in considering whether reg 8 of the 1980 Regulations applies, the learned judge ruled that it mattered not who offered alternative employment, there was alternative employment offered. As such, it was without doubt that the applicants were offered permanent employment. Therefore, reg 8 applies to the case at hand;

(d) it was proven that the applicants staged a walk-out from the meeting on 18 September 2010 and the applicants' conduct by staging a walk out must be construed to evince an intention of rejecting the offer;

(e) the applicants could not show Langkasuka Hotel had acted mala fide in dismissing the applicants from their employment;

(f) the second respondent's decision was supported by evidence, in that, the applicants were dismissed because they rejected the offer of alternative employment at Helang Hotel. As such their dismissal was justified; and

(g) there was no error of fact and law committed by the second respondent in dismissing the applicants' claim that their dismissal was with just cause and excuse.

A **[45]** Having stated both the findings of the second respondent as well as those of the learned judge, our next task was to scrutinise those reasoning and decide if the decision was tainted with 'illegality', 'irrationality' and 'procedural impropriety' as claimed by the applicants to merit curial intervention by this court.

B

[46] We propose to deal with the first issue relating to the findings of the second respondent that the reinstatement of the applicants in Langkasuka Hotel was 'legally rendered impossible' and was 'beyond the control and purview' of Langkasuka Hotel as the property had passed to its new owner, C Global Upline, which had renamed the said hotel as 'Four Points By Sheraton Langkawi Resort'.

[47] The above findings had been affirmed by the learned judge who had stated when the construction works at the said hotel was completed several D months later, Langkasuka Hotel was taken over by Global Upline and the new management had renamed Langkasuka Hotel as 'Four Points By Sheraton Langkawi Resort'. The franchise to manage and run the new hotel was given to Starwood Asia Pacific Hotels & Resort Pte Ltd. The learned judge went on to say that this was a business decision that was made by the owner of Langkasuka E Hotel, one Tan Sri Ting Pek Khiing. As such the demand by the applicants for them to be reinstated at Langkasuka Hotel was impossible to be fulfilled because the new hotel is a new entity. Hence the applicants could not force the new hotel, to reinstate the applicants as their new employees because the MoA is with Langkasuka Hotel and this hotel was no longer in existence. As a result F of this, the MoA has become a frustrated contract.

[48] Having perused the record of appeal we found that the decision by the learned judge as stated above was not supported by evidence. In deciding so, G the learned judge had failed to take into consideration relevant consideration apparent from the records before her that on 26 August 2010, the day the meeting was called and the claim that the offer was purportedly made to the applicants, Langkasuka Hotel had given the assurance to the union vide the MoA made pursuant to s 18 of the IRA, amongst others, that it would reinstate H the applicants at Langkasuka Hotel on 31 October 2010. Despite this guarantee and/or assurance in just about 23 days, ie on 18 September 2010 after the MoA was executed by both the union and Langkasuka Hotel pursuant to s 18 of the IRA, the applicants were notified that as there was change in the ownership of the said hotel, they could not be reinstated in Langkasuka Hotel. I In doing so the learned judge failed to consider the following:

(a) common sense would tell one that it is impossible to negotiate and finalise the sale of the hotel with the size of Langkasuka Hotel within 23 days as there are many processes involved in the sale of the property and in the running of a hotel business. The learned judge failed to consider

this point and was under the misapprehension of fact because the take-over was said to have been finalised by 18 September 2010, as per the announcement made by the said hotel on 18 September 2010, and not several months later as stated in the learned judge's grounds of judgment. This could not be correct as only on 26 August 2010, Langkasuka Hotel had given the assurance to the applicants that they would be relocated at the said hotel on or by 31 October 2010 and shortly after that, ie on 18 September 2010, the applicants were told that the said hotel had changed ownership; and

(b) even if the sale of the said hotel had actually been finalised within 23 days, the learned judge failed to appreciate the fact that this was indicative of mala fide on the part of Langkasuka Hotel because after agreeing to reinstate these applicants by 31 October 2010 at the said hotel vide the MoA, the said hotel was actually working behind the applicants' back to negotiate the sale of the said hotel to defeat cl 2(i) of the MoA.

[49] We are of the view that both the second respondent as well as the learned judge fell into an error of both fact and law because they had failed to consider that Langkasuka Hotel's claim that it had changed ownership was merely a bare assertion unsupported by evidence. If it is true as alleged that it had changed ownership there would be some form of evidence of the sale and purchase agreement of the said hotel and/or Form 14A to indicate the transfer had taken place or any other form of documentary evidence. From the ROC search there was nothing to connect Global Upline and the ownership of the said hotel.

[50] Both the second respondent and the learned judge had failed to properly evaluate the evidence placed before the second respondent as Langkasuka Hotel's own witnesses had confirmed that at the material time, the owner of the Helang Hotel and Sheraton Langkawi was one and the same, Tan Sri Ting Pek Khiing. COW1 admitted he was the author of the letter dated 19 April 2012 (see p 131 of *Jld* 2 of appeal record Parts B and C) which had confirmed that Helang Hotel is under the same ownership and management as Sheraton Langkawi Beach Resort. COW1 was also the author of CLB and vide CLB he had stated that Sheraton Langkawi is under the same ownership and management as Sheraton. The owner of these hotels is none other than Tan Sri Ting Pek Khiing (see p 303 of *Jld* 2 of appeal record Parts B and C).

[51] The fact that COW1 could not support Langkasuka Hotel's claim and gave contradictory evidence as to the ownership of Sheraton Langkawi (see pp 302–303 of *Jld* 2 of appeal record Parts B and C) proved that Langkasuka Hotel did not have the documentary evidence pertaining to the change of ownership, otherwise it would not be difficult for Langkasuka Hotel to prove the same. COW2 in his evidence confirmed that his witness statement vide

question 15 which stated that the property had changed hands was based on hearsay evidence from the management and there was no documentary evidence to support this. In short, there was no evidence tendered by Langkasuka Hotel that there was change of ownership. Therefore both the second respondent and the learned judge erred in holding that there was change of ownership. Further, the ROC search showed that the nature of Global Upline's business was 'construction and letting of heavy equipment' and nothing to do with hotel business. In the upshot, the claim by Langkasuka Hotel that it had changed ownership was a bare assertion with no basis in reality. This proved that there was in fact no change in the ownership.

[52] There was a CA entered into by the union and Langkasuka Hotel and this CA is binding on both parties. Any dispute which arises between the union and Langkasuka Hotel must be resolved pursuant to the terms and conditions as encapsulated in the CA. Pursuant to article 1 of the CA, the terms and conditions contained in the CA shall be binding on Langkasuka Hotel and its successors, assignees or transferees. Therefore, the terms and conditions stated in the CA shall be equally binding on Sheraton Langkawi under article 1 of the CA.

[53] The court also refers to s 17 of the IRA which provides as follows:

> (1) A Collective Agreement which has been taken cognizance of by the Court shall be deemed to be an award and *shall be binding on*:
>
> (a) *The parties to the agreement* including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates *and their successors, assigns or transferees*; and
>
> (b) All workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

[54] In interpreting this provision, the Court of Appeal in the case of *Abdul Aziz Abdul Majid & Ors v Kuantan Beach Hotel Sdn Bhd & Ors* [2012] 1 LNS 1294 held as follows:

> [31] Quite independent of the second respondent having agreed to take over liability in respect of the appellants, the question whether the second respondent will be bound by the Collective Agreement will depend on whether it can be regarded as a 'successor assign or transferee' of the first respondent within the meaning of s 17(1) of the Industrial Relations Act 1967.
>
> [32] In our judgment the second respondent is such a successor, assign or transferee within the meaning of s 17(1). We say so for the following reasons.
>
> [33] In *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547 the Federal Court in considering the provisions of s 17(1) held at p 544 that the words 'their successors, assigns or

transferees' contained in 17(1)(a) must be taken to mean the successors, assigns and transferees of both parties to the Collective Agreement and not only to the members of a trade union ... We agree with the appellants that the decision of the Federal Court shows that a purchaser of a business would be bound by a Collective Agreement if it is established that the purchaser is a successor, assign or transferee of either of the parties to a Collective Agreement.

[34] For the reasons given by us earlier, it is our view that as *the business of the hotel owned and operated by the first respondent was effectively transferred to the second respondent under the sale and purchase agreement, the second respondent was a successor, assign or transferee of the first respondent within the meaning of s 17(a) of the Industrial Relations Act and is bound by the Collective Agreement entered into between the first respondent and the appellants.*

[55] Therefore, even assuming that there was change of ownership from Langkasuka Hotel to Sheraton Langkawi as claimed, Hotel Sheraton is still bound by the CA pursuant to s 17 of the IRA and article 1 of the CA.

[56] There was already in place a mechanism provided under the IRA, by way of a negotiation and/or conciliation process which must be adhered to by the contracting parties. By way of article 4 of the CA which relate to settlement of dispute, stage 4 makes provision for the matter to be referred to DIR for conciliation or mediation process. The MoA executed by both the union and Langkasuka Hotel must be treated as sacrosanct as this is a solution provided by the law and as agreed between parties.

[57] The MoA is admissible and binding under s 54(1) and (2) of the IRA. Under sub-s 54(1) no evidence shall be given in proceedings before the Court of any negotiation and/or conciliation other than a written statement agreed to and signed by the parties to the dispute. Under sub-s 54(2) no evidence shall be given of any proceedings before DGIR under s 20(2) other than a written statement agreed to and signed by the parties to the reference.

[58] It would appear from the evidence, the whole process leading to the termination of the applicants from the employment of Langkasuka Hotel was hapzardly done. The issue faced by the applicants was a serious issue involving their rights to livelihood. A matter as serious as this ought to be dealt with in a more harmonious and diplomatic manner rather than hurriedly done as reflected in the records before us. Despite the CA, Langkasuka Hotel had merely called the applicants by giving them no notice and/or short notice and without the union being present. In fact there was no discussion with the union pertaining to matters affecting the livelihood of the applicants.

[59] We also observed that the contract of employment of the applicants with Langkasuka Hotel which according to said hotel, had changed its

ownership, was not terminated in writing to enable fresh offers in writing to be made by Helang Hotel. A reasonable employer would have discussed the matter with the union and/or would have issued fresh letters to the applicants to convey to the applicants their terms and conditions of service. There was in fact procedural non-compliance of the mechanism as agreed between parties. As such the failure on the part of the second respondent in taking this fact into consideration had resulted in the decision to be tainted with procedural impropriety and/or unfairness. There was clear breach of the CA.

[60] We were of the view that the learned judge was plainly wrong when she decided that reg 8 would apply to the factual matrix of the case at hand as according to the learned judge it was without doubt that the applicants were offered alternative employment with Helang Hotel. It is our considered view that reg 8 was wrongly applied by the learned judge as well as the second respondent. For ease of reference reg 8(1) and (2) are reproduced below as follows:

> (1) Where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under these Regulations, *if within seven days of the change of ownership, the person by whom the business is to be taken over immediately after the change occurs, offers to continue to employ* the employee under terms and conditions of employment not less favourable than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer.
>
> (2) *If the person by whom the business is to be taken over* immediately after the change occurs *does not offer to continue to employ the employee* in accordance with paragraph (1), the contract of service of the employee shall be deemed to have been terminated, and consequently, the person by whom the employee was employed immediately before the change in ownership occurs shall be liable for the payment of all termination benefits payable under these Regulations.

[61] Regulation 8 would be applicable only if a change in ownership of the business occurred either by virtue of a sale or other disposition or by operation of law for which the employees would not be entitled to termination benefits and within seven days after the change of ownership had taken place, *the person who had taken over the business offers* the employee to continue under the terms and conditions of employment not less favourable than those under which the employee was employed before the change occurs and the employees unreasonably refuses the offer. The purported offers to the applicants were not made by Sheraton Langkawi as envisaged by reg 8 but by a different entity, Helang Hotel. The importance of this distinction had been ventilated by the Supreme Court in the case of *Kumpulan Kamuning Sdn Bhd v Rajoo And 200 Others* [1983] 2 MLJ 400; [1983] CLJ Rep 207 where the court held as

follows:

> Another material distinction between the two provisions is that the offer under reg 4(3) must come from the *same employer* not less than seven days *before* the date with effect from which his service is to be terminated; whereas under reg 8 it is the *new owner* who must make the offer within seven days *of the change* of ownership. *Thus, where the termination of service is occasioned by a change of ownership of the employer's business, termination benefits are payable if the new owner failed to make the offer within the prescribed time ...*

[62] Therefore, even assuming for a moment that there was in fact a change of ownership, there was no offer from the new owner in this case to absolve liability under reg 8 above. In any event, as stated above, it is our finding that there was no change of ownership as there was no evidence to support such a suggestion. Therefore, Langkasuka Hotel could not rely on reg 8 to terminate the applicants and/or deny them of their rights to termination benefits.

[63] We also observe that there was no real or proper offer of employment made on 18 September 2010 when the emergency meeting was called, for the applicants to reject anything as claimed. The whole process viewed from the perspective of a reasonable employer was to deny the applicants of their entitlement to negotiate pursuant to the CA and/or to refer such dispute in accordance with the scheme provided by the IRA which is already in place.

[64] From the facts placed before us, Langkasuka Hotel had shown clear intention not to be bound by the CA which was binding on them especially, among others, cl 4 for settlement of dispute which recognised the importance of the full discussion in clearing misunderstanding and to take reasonable effort to preserve harmony. The next matter concern cl 12 relating to service charge and matters related to service charge and cl 28 for retrenchment and retrenchment benefits.

[65] In the book *Law of Dismissal* co-authored by Nallini Pathmanathan, Sivakumar Kanagasabai and Selvamalar Alagaratnam (see p 225 of *Jld* 2 of appeal record Parts B and C) it was stated that 'the law allows an employer to terminate an employee for good reason and closure of business is a valid reason'. This principle is entrenched in s 12(3) of the Employment Act 1955. Unlike in the case at hand, we could not find any evidence to support the contention that the termination of the applicants' employment with Langkasuka Hotel was for good reason. The applicants were terminated on 21 September 2010, one day after the termination notice dated 20 September 2010 was issued in an emergency meeting without giving them any notice and/or any monetary compensation in lieu of notice based on the ground that they had staged a walk-out. At that point in time, there was no proper and clear offer made to them. Helang Hotel had not employed them properly and Langkasuka Hotel

had not terminated the services of the applicants officially. Helang Hotel had not made any offers in writing and given time to these applicants to ponder, discuss or counter offer. The whole exercise was an arbitrary act on the part of Langkasuka Hotel to the detriment of the applicants. Further, Langkasuka Hotel failed to give notice to the union members and/or it failed to provide the environment for discussion and/or conciliation.

[66] Even assuming we were wrong in our understanding of reg 8, and that there were in fact offers made by Helang Hotel, we were of the view that the offers made were less favourable than the terms and conditions under which the applicants were employed in Langkasuka Hotel. We said so because the applicants entitlement for service charges was very much lower than what they obtained under their original employment. This was confirmed by the learned judge herself where the learned judge had stated in her grounds of judgment (see p 35 of *Jld* 1 of appeal record Part A) that although the service charges received by the applicants was significantly reduced, this was due to the fact that the service charges was to be shared with a large number of employees.

[67] The learned judge went further to say that this was not a situation where Langkasuka Hotel or Helang Hotel had purposely reduced the service charges without any valid reason. It is apparent from this finding of the learned judge that the applicants' purported terms and conditions of employment offered to them was much less favourable than what was enjoyed by the applicants before as stated in cl 12 of the CA. It is a known fact that employees of the hotels were dependent on service charges because their basic salary is rather low. It is also an acknowledged fact accepted in the hotel industry that the service charges is very important component of the employee's wages. The applicants' entitlement to service charge is recognised and form the main attraction to lure anybody to join the hotel industry. Service charge is considered as wages and the Industrial Court in *Kesatuan Pekerja-pekerja Hotel, Bar & Restoran, Semenanjung Malaysia v Hotel Equatorial (M) Sdn Bhd* [2008] 3 ILR 590 had regarded as trite law that service charge is treated as part of wages and constituted 60% to 80% of the employees monthly income. Hence cl 2(ii), cl 2(iii) of the MoA had been breached. In the Court of Appeal case of *Abdul Aziz Abdul Majid & Ors* the court accepted that service charge is part of wages and held as follows:

> *In the first place it is settled law that service charge is part of the wages of an employee*. See *Hotel Equatorial (M) Sdn Bhd v Thomas George*, High Court Rayuan Sivil R2-16-6-95 which was affirmed by the Court of Appeal; and *Bukit Jambul Hotel Development Sdn Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia* [2005] 2 ILR 927 at p 943.

[68] The rationale behind this approach had been explained in the case of *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung*

Malaysia [2017] 9 MLJ 119; [2015] 1 LNS 1450, where the court held that:

> 39. The concept of service charge had been discussed in the case of *National Union of Hotel, Bar and Restaurant Workers, Peninsular Malaysia v Masyhur Mutiara Sdn Bhd* [2014] 1 MELR 286). The rationale for the introduction of the service charge in the hotel industry was to replace the practice of tipping which only benefited the guest service employees of the hotels but not others who were not in direct contact with the customers or patrons of the hotel. In order to provide a more equitable scheme to be enjoyed by the eligible employees, guest service or non-guest service alike, a collection system which could be shared by all eligible employees of the hotel was introduced by the leading hotel, known as Merlin Hotel and this had set the standard for other hotels to adopt. This service charge system had become the norm in the hotel industry and become an important component of wages paid to hotel employees.

[69] Therefore, clearly the decision of Langkasuka Hotel was not only a breach of cl 2(ii) of the MoA but in fact a clear deprivation of wages to the applicants and hence a violation of the Employment Act 1955 which requires the wages of any one month to be paid by the seventh day of the following month, at the latest. This had caused injustice to the applicants.

[70] There was evidence placed before the second respondent that the average monthly service charge per point in Langkasuka Hotel for 2009 was RM257.92 whereas it was a mere RM28.79 in Helang Hotel. This was about 11.2% of that in Langkasuka Hotel. Besides that there were instances that these service charge had not been paid at all. As at 18 September 2010, the service charge for May and June 2010 had not been paid and the April 2010 service charge was paid only in September 2010. This had been highlighted by the union in its letter dated 8 May 2010 to Langkasuka Hotel (see p 132 of *Jld* 2 of appeal record Parts B and C). The particulars pertaining to service charge had also been highlighted by the applicants in their written submission filed in court which we fully endorsed.

[71] We have also noted the submission of learned counsel for Langkasuka Hotel that the applicants were in fact transferred to from Langkasuka Hotel to Helang Hotel. However we found that there was no merit in this line of submission. Firstly, it was never the pleaded case of Langkasuka Hotel at the Industrial Court and this issue of transfer was never put before the Industrial Court for determination. We could not find any evidence to indicate the whole exercise was in fact a transfer from Langkasuka Hotel to Helang Hotel. Pursuant to the letter dated 20 September 2010, Helang Hotel had notified the applicants its intention to call for the meeting on 18 September 2010 was to reconfirm the applicants' employment with Helang Hotel. It was also stated in the same letter that the reason the 18 September 2010 meeting was called was to offer the applicants permanent employment at Helang Hotel. Therefore, it was not a transfer exercise as submitted by learned counsel for the respondent.

Premised on the above reason, the submission by learned counsel that this exercise was a transfer ought to be rejected by us.

[72] There was no notice of termination issued by Langkasuka Hotel and/or termination effected by the said hotel as required by the law. The termination was in fact effected by Helang Hotel which had not shown that it had made a written offer to the applicants which was rejected. In *Radtha d/o Raju & Ors v Dunlop Estates Bhd* [1996] 1 MLJ 561; [1996] 1 CLJ 755 the Court of Appeal upheld the Labour Court decision that in view of the takeover of the estate by a new owner, the employees were entitled to notices of termination from Dunlop Estate Bhd despite all of them being offered and accepted continued employment by the new company. This indicates that the original employer is required to give advance notice of any termination by the original owner due to any change in ownership, even though there was a job offer from the new employer. In the case at hand, there was no job offer from Sheraton Langkawi. There was also no notice of such change in ownership ever given to the applicants by Langkasuka Hotel. As such, the second respondent had committed error of law in not taking these facts and grounds into consideration.

CONCLUSION

[73] We are of the view that when the findings of the second respondent had been arrived by taking into consideration irrelevant matters and/or had failed to take into consideration relevant consideration as illustrated above, such findings are always amenable to judicial review on the ground commonly referred to as '*Wednesbury*'s unreasonableness' (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223). The second respondent must exercise its power reasonably.

[74] We have perused the appeal record and the written submissions of the respective parties we found that the decision of the second respondent was so unreasonable and predicated on unsupported evidence and/or law. As illustrated above, from the outset the decision making process was tainted with the elements stated by the applicants in their O 53 r 3 statement, namely, illegality, irrationality and procedural impropriety.

[75] We found that the learned judge had relied on grounds proffered by the second respondent in arriving at her decision to affirm the second respondent's award without making her own analysis and evaluation of the facts surrounding the appeal and/or without appreciating the relevant law applicable to the factual matrix of this case. Based on the facts that we had alluded herein, no reasonable tribunal would have come to the conclusion as reached by the second respondent.

[76] Having examined the appeal record and perused the written submission and heard the oral arguments, we were constraint to hold that the learned judge failed to judicially appreciate the evidence and/or the law presented before her so as to render her decision plainly wrong and upon curial scrutiny merit our appellate intervention.

[77] Based on the aforesaid, we unanimously allowed this appeal with costs. The decision of the High Court was set aside. We grant the application for judicial review in terms of prayers (i), (ii) and (iv) as follows:

(a) an order of certiorari to be issued to quash the Award of the of the second respondent vide Award No 50 of 2015 dated 15 January 2015;

(b) an order of mandamus being issued to direct the second respondent to assess compensation in lieu of reinstatement in accordance with the normal practice adopted in Industrial Court as it is not feasible to reinstate the applicants in first respondent; and

(c) costs of the proceedings herein and below in the sum of RM20,000 to be paid by the respondent to the applicants subject to allocator.

[78] We further ordered for the costs awarded by the High Court in the sum of RM5,000 to be refunded to the applicants and the deposit to be refunded.

[79] We therefore ordered accordingly.

Appeal allowed, decision of the High Court set aside, the second respondent's award quashed and directed it to assess the compensation in lieu of reinstatement payable to the appellants.

Reported by Ashok Kumar